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No. 87-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STANLEY BOCLAIR and JOEL T. PELZ,

Appellants,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court's decision granting the parties in a criminal case reciprocal discovery rights of verbatim statements describing the crime violates an accused's federal constitutional rights.

2. Whether a verbatim statement describing a crime constitutes work product.

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MOTION TO DISMISS OR AFFIRM

The People of the State of Illinois, appellee in this cause, move this Court to dismiss the present appeal or, in the alternative, to affirm the judgment of the Illinois Supreme Court, for the following reasons:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rule 413, Ill. Rev. Stat. ch. 110A, § 413, provides in pertinent part:

> Disclosure to Prosecution
>
> * * *
>
> (d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and
>
> (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;
>
> (iii) and if the defendant intends to prove an alibi, specific information as to the place where

he maintains he was at the time of the alleged offense.

(e) Additional disclosure. Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule.

Illinois Supreme Court Rule 412, Ill. Rev. Stat. ch. 110A, § 412, provides in pertinent part:

Disclosure to Accused

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the

prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert;

(v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

If the State has obtained from the defendant pursuant to Rule 413(d) information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the state intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii) and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause.

* * *

STATEMENT OF THE CASE

Stanley Boclair was charged in a November 1, 1984, indictment with four (4) counts of murder based on the killing of an inmate at the Pontiac Correctional Center.[1] (R.C. 1) On November 7, 1984, Boclair was arraigned and entered a plea of not guilty. (R.C. 1) The Livingston County Public Defender was appointed to represent Boclair and both parties moved for discovery. (R.C. 1, 8)

The prosecution's discovery motion requested, in part, that the defense disclose:

> Any books, papers, documents, photographs, or tangible objects which the defense intends to use as evidence or for impeachment at hearing or trial.

(R.C. 8) During the process of discovery the prosecution listed over 200 potential witnesses, including approximately 140 prison inmates. (R.C. 2, 5)

On December 19, 1984, the trial court appointed the law firm of Jenner and Block as counsel for Boclair, and thereafter Joel T. Pelz from that firm has been one of the attorneys representing Boclair. Pursuant to the trial court's order, the defense was authorized to expend public funds for an independent investigator.

Pelz and defense investigator Anthony Matens then began interviewing many of the prosecution's witnesses, including some of the prison inmates. During those interviews, Matens took handwritten notes. (R.C. 30)

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[1] Boclair has been convicted of murder and sentenced to death.

On March 14, 1985, a hearing was held on a number of defense motions. When Mr. Pelz addressed defendant's motion for supplemental discovery, he noted that the first paragraph requested, "memoranda and notes of people who conducted the investigation, any of those that reflect oral statements given by a witness or a potential witness." (R. 9) Pelz stated "I believe that the defendant is entitled to those and certainly he is entitled to those if any of those are to the extent they would be in the effect of a summary or virtually a narrative of what the witness has told one of the investigators." (R. 9) The prosecution recognized that such material was discoverable and agreed that the motion should be allowed. (R. 9-10)

The prosecution then requested that the order be made reciprocal and requested to see the notes and memoranda prepared during interviews of prosecution witnesses. (R. Vol. 10) Specifically, the prosecution indicated that a number of its inmate witnesses had been interviewed by Matens and requested to see any factual statements contained in these interviews which were reduced to writing. (R. 10) The prosecution argued:

> Well, counsel is asking for the notes that we produced during the investigation and I am asking for the notes he has produc[ed] and as long as they are statements of witnesses, they are discoverable material and the reason they are discoverable is because discovery is intended to prevent surprise, and if I have to produce statements to the defense the purpose is not only for him to know what those witnesses may testify to but also, and more importantly and it is highly unfair and prejudicial to the State to put John Doe on the stand to testify to one thing according to the statements he gave us at the initial investigation and then cross-examine using statements that I have never seen before taken by either defense

> counsel or their investigators and it is that portion of the trial that concerns me. I don't want these people cross-examined regarding statements they made to defense counsel or investigators that I am not aware of. . . .

(R. 13-14)

The court ruled that statements of witnesses concerning the event were discoverable under Supreme Court Rule 413(d)(ii), and (e) and the inherent authority of the judiciary to regulate the administration of criminal justice. (R.C. 28-29)

The court initially noted that the credibility of inmate witnesses is of crucial concern for offenses allegedly occurring within a correctional institution, that inmates may be more likely than other witnesses to make inconsistent statements to several investigators, and that as a result the prosecution had made a strong case for discovery of such reports. (R.C. 25-26)

The court concluded an *in camera* inspection of the notes and it excised those portions which were work product. The court ordered the defense to disclose the names of persons interviewed and the portions of the notes which consisted of verbatim statements. (R.C. 31) Pelz refused to comply with the court's order and the court found him to be in contempt.[2] (R. 87)

Pelz appealed and the Illinois Appellate Court, Fourth District, reversed the contempt order, holding that the investigator's reports were work product and not discov-

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[2] The parties agree that Pelz was found to be in direct civil contempt.

erable before trial pursuant to Supreme Court Rule 413. (*Ill. Rev. Stat.*, 1981, ch. 110A, sec. 413) The court concluded that, at most, the notes could be used to refresh the defense investigator's recollection if he testified as an impeaching witness. The court stated that the notes would not be material intended to impeach prosecution witnesses as contemplated by Rule 413(d)(ii). The court stated:

> The defense investigator's reports do not contain factual information not otherwise obtainable by the prosecution; their only value is to cross-examine defendant's investigator should he take the stand. In the present case, the sought-after reports will be irrelevant unless and until defendant's investigator testifies to impeach one of the State's witnesses.

People v. Boclair, 139 Ill. App. 3d 350, 487 N.E.2d 969, 973 (4th Dist. 1985). The court also agreed with defendant that the material fell within the work product privilege and was thus protected from discovery. For these reasons the court reversed the contempt citation of defendant's attorney and remanded the cause for further proceedings.

The Illinois Supreme Court reversed the appellate court, interpreting Rule 413(c) to allow disclosure of the verbatim statements of prosecution witnesses. *People v. Boclair*, No. 63132. Pelz appeals the Court's decision.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

I.

THE TRIAL COURT'S ORDER REQUIRING PRE-TRIAL DISCLOSURE OF STATEMENTS OF PROSECUTION WITNESSES MADE TO A DEFENSE INVESTIGATOR DID NOT DEPRIVE THE DEFENDANT OF ANY FEDERAL CONSTITUTIONAL RIGHT.

Prior to trial defendant moved for discovery of memoranda prepared by prosecution investigators which reflected oral statements given by prospective prosecution witnesses. Defense counsel argued:

> I believe that the defendant is entitled to those and certainly he is entitled to those if any of those are to the extent they would be in the effect of a summary or virtually a narrative of what the witness has told one of the investigators.

(R. 9) The prosecution agreed that any such statements were discoverable and requested that any discovery order to that effect be made reciprocal, thereby requiring defendant to disclose oral statements made by prosecution witnesses during interviews with defense investigator Matens. (R. 10) The prosecution argued that it would be unfair to allow the defense to cross-examine prosecution witnesses with statements which the defense had not disclosed. (R. 13-14)

The trial court ultimately ordered defendant to disclose the statements, finding that "to the extent that such reports contain statements of witnesses concerning the alleged event, it appears that those portions of such reports fall outside the work product exception." (R.C. 27-28) The

trial court then conducted an *in camera* inspection of the notes and ordered disclosure of those portions of the notes which did not constitute work product. (R.C. 31) Defense counsel's refusal to comply with the court's order led to counsel's citation for contempt. The Illinois Supreme Court approved the sanction, holding that discovery of the statements was proper under its rule 413(e). *Ill. Rev. Stat.*, 1983, ch. 110A, sec. 413(e).

Counsel now argues that this interpretation was incorrect because it deprived the defendant his Sixth Amendment right to effective assistance of counsel, his Fifth and Fourteenth Amendment protection from the disclosure of work product, and his Fifth and Fourteenth Amendment right against compelled assistance of the prosecution. (Jur. Stat. at 13) These claims fail for a number of reasons. Most obviously, verbatim statements describing a crime are not work product because they do not include the mental impressions of defense counsel or any other member of the defense team. In addition, disclosure of the statements does not require the accused to assist the prosecution because any consistent statements merely duplicate the prosecution's information, and, as defendant recognizes, any inconsistent statements are discoverable as potential impeachment. For these reasons, defendant has failed to present a substantial federal question to this Court which would justify the exercise of the Court's jurisdiction.

Illinois Supreme Court Rule 412(j)(i) prevents the pretrial disclosure of "records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff." *Ill. Rev. Stat.*, 1983, ch. 110A, sec. 412(j)(i). The

prosecution has agreed throughout these proceedings that any work product contained in the defense investigator's reports or notes was protected during pre-trial proceedings by Rule 412(j)(i). *People v. Knippenberg*, 66 Ill. 2d 276, 362 N.E.2d 861 (1977).

The Court below determined that prospective witness statements describing a criminal incident are not work product, and, because such statements constitute potential impeachment, are discoverable prior to trial. (*People v. Boclair*, No. 63132, Appellant's Appendix at 6) The People contend that the decision does not violate any right guaranteed by the federal constitution.

In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), this Court noted that an attorney's trial preparation materials retain a qualified immunity during pretrial civil discovery. The great majority of states now offer work product protection to both the prosecution and defense in criminal litigation, and courts have relied on civil precedent in criminal work product cases. Feldman, Steven., "*The Work Product in Criminal Practice and Procedure*", 50 U. Cin. L. Rev. 495, 506 (1981).

However, it is clear that absent a constitutional privilege, statute, or rule, the defense in a criminal case has no valid interest in pretrial concealment of relevant information from the prosecution. *Jones v. Superior Court.* 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962).

In *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), this Court considered the problems arising in a criminal trial in which defense counsel sought to impeach the credibility of key prosecution witnesses with the testimony of a defense investigator regarding statements previously obtained from the witnesses by the

investigator. The factual circumstances in *Nobles* are thus very close to the present case. The issue there was whether the federal trial court could compel the defense to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. An investigator for Nobles had interviewed two prosecution identification witnesses and preserved the essence of those conversations in a written report. After the witnesses testified, the defendant attempted to call the investigator as a defense witness, but the trial court said that an edited *in camera* copy of the report would have to be submitted to the government at the close of the investigator's impeachment testimony. Defense counsel refused to produce the report and the trial court precluded the investigator's testimony. This Court found that the investigator's report was highly relevant to the critical issue of credibility, and that its production would enhance the search for truth. *Id.* 95 S.Ct. at 2167. The Court states that the work product doctrine is not an absolute privilege but may be waived like other qualified privileges. The Court found that the defendant waived any work product privilege by calling the investigator to testify to matters covered in the report. The Court held that the production of a defense investigator's witness report after the investigator has testified at trial complies with the defendant's privilege against compulsory self-incrimination. 95 S.Ct. at 2168.[3]

[3] In an earlier case, the Supreme Court in *United States v. Jencks*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), ordered disclosure of prior statements of all government witnesses, partly out of fear of fabrication or misstatement by the government's professional witnesses. The *Jencks* court said that to deny disclosure of prior statements which might be used to impeach the witness was to "deny the accused evidence relevant and material to his defense" and also rejected as unrealistic any rule that would re-

(Footnote continued on following page)

In his concurring opinion in *Nobles*, Mr. Justice White considered the basis for protection of the investigator's notes. Justice White noted that decisions have largely confined the work product rule to its role as a limitation in pretrial discovery. He stated that although a party seeking to discover a statement made to an opposing party in order to prepare for trial can often obtain the "substantial equivalent" by interviewing the witness himself, a prior inconsistent statement in the possession of his adversary is unique. 95 S.Ct. at 2175. Even in *Hickman v. Taylor, supra*, the Court recognized that discovery may be had of relevant and nonprivileged facts in an attorney's file if necessary to the preparation of a case. The *Hickman* court said such written statements or documents "might be useful for *purposes of impeachment* or corroboration." 67 S.Ct. at 394 (emphasis added). Justice White concluded that the work product rule of *Hickman v. Taylor* had no application to the request at trial for evidentiary and impeachment material. 95 S.Ct. at 2178. In fact, it has been persuasively argued that Justice White strongly intimated that the interest of the jury in obtaining all relevant information should outweigh any work product considerations. Scheininger, 14 Am. Crim. Law Rev. at 12. The People agree with such a position.

In *Goldberg v. United States*, 425 U.S. 94, 96 S.Ct. 1338, 1342, 47 L.Ed.2d 603 (1976), the Court held that a writing prepared by a government lawyer relating to the subject

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[3] *continued*
quire the defendant to demonstrate the impeachment value of prior statements before disclosure. 77 S.Ct. at 1013. *Nobles* should have a comparable interpretation as *Jencks*, with "full disclosure" of all relevant facts. Scheininger, Michael G., "*United States v. Nobles: A Prosecutor's Perspective*," 14 Am. Crim. L. Rev. 1, 6 (1976).

matter of the testimony of a government witness is producible under the *Jencks* Act and is not rendered nonproducible because a government lawyer interviews the witness and writes the statement. The Court found nothing in the *Jencks* Act or its legislative history that excepts from production otherwise producible statements on the ground that they constitute "work product" of government lawyers. 96 S.Ct. at 1344. The *Goldberg* court cited *United States v. Nobles, supra,* in concluding that the primary policy underlying the work product doctrine, the protection of the privacy of an attorney's mental processes, is adequately safeguarded by the *Jencks* Act itself. 96 S.Ct. at 1346. The *Nobles* decision cited numerous cases in which the Court had repeatedly recognized a court's inherent power to require the prosecution to produce the previously recorded statement of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced. 95 S.Ct. at 2166.

Since the prosecution's concern is for impeachment purposes which is an exception recognized under *Hickman,* and since the trial judge excluded from disclosure any material relevant to the attorney's opinion or trial strategy, the trial court properly ordered defendant to disclose the verbatim statements obtained from prosecution witnesses.

II.

RECIPROCAL DISCOVERY OF VERBATIM STATEMENTS BY PROSPECTIVE WITNESSES DESCRIBING THE CRIME DOES NOT DEPRIVE THE ACCUSED HIS RIGHTS TO DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL.

Illinois courts have correctly determined that pretrial discovery in criminal cases is designed to promote the truthfinding process and to eliminate surprise as a tactical advantage for *either* side. *People v. Caliendo,* 84 Ill. App. 3d 987, 40 Ill. Dec. 41, 405 N.E.2d 1133 (1st Dist. 1980). To further this goal, Illinois Supreme Court Rule 412(a)(i) provides:

> (a) Except as otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel; . . .

Ill. Rev. Stat., 1981, ch. 110A, sec. 412(a)(i).

Thus, the prosecution is required to disclose to the accused not only the names of witnesses it intends to call, but also written statements and memoranda containing

substantially verbatim reports of their oral statements. Compliance with this rule is mandatory, being excused only if the prosecution was unaware of the existence of a statement prior to trial. See *People v. Boucher*, 62 Ill. App. 3d 436, 19 Ill. Dec. 675, 379 N.E.2d 339 (3rd Dist. 1978).

In *People v. Szabo*, 94 Ill. 2d 327 (1983), the defendant sought discovery of "substantially verbatim reports of [the] oral statements of a prosecution witness" pursuant to *Ill. Rev. Stat.*, 1981, ch. 110A, sec. 412(a)(i). *Id.* 94 Ill. 2d at 343. The prosecution informed the court that it destroyed the notes and the trial court did not order the prosecution to attempt to reconstruct them, finding that the disclosure of other written statements provided the defendant with adequate discovery. The Illinois Supreme Court disagreed, interpreting Rule 412(a)(i) to mean that the prosecution was required to disclose all the notes of its interviews with the witness for *in camera* inspection by the trial court, which would redact all privileged material and pass on to defendant "any unprivileged, substantially verbatim statements. . ." *Id.* 94 Ill. 2d at 345.

In the present case, as well as in *People v. Lego*, ___ Ill. 2d ___, 507 N.E.2d 800 (1987), the Court applied this reasoning to the prosecution's discovery rights. *People v. Boclair*, No. 63132, Appellant's Appendix at 6; *People v. Lego, supra*, 507 N.E.2d at 805.

Commentators have supported the provisions in the supreme court rules requiring disclosure by the defense to the prosecution:

> The rationale for discovery against the defense is the same as that underlying discovery against the prosecution. Discovery eliminates surprise and allows a superior opportunity to probe for truthfulness.

Zagel and Carr, 1971, U. Ill.L.F. 557, 584.

The ruling below is supported by a common sense principle of reciprocity, since defense counsel had already requested and been granted access to statements of witnesses given to prosecution investigators. The prosecution agreed that such statements regarding the event were discoverable and agreed to furnish typewritten notes and whatever handwritten notes were available. (R. 10-11) Without such reciprocity, criminal discovery would be a one-way street in favor of the defendant. This Court certainly does not intend such a result.

Defendant first argues that the Court's ruling would deprive him of the effective assistance of counsel because it would interfere with counsel's ability to prepare a defense.[4] (Jur. Stat. at 15-16) It is difficult to imagine how disclosure of verbatim statements describing a crime would interfere with an accused's effort to prepare a legitimate defense. If the statement proves inconsistent, the prosecution is entitled to its disclosure, and, if the statement is consistent with the prosecution's expectations, then the defendant has not been prejudiced.

Defendant's argument that "the State sought to use defense counsel to obtain additional information to bolster its case . . ." (Jur. Stat. at 17), misunderstands the purpose of the prosecution's request. The prosecution actually sought only information which would impeach its witnesses. In this regard, the prosecution would be fully informed of which witnesses would prove detrimental to its case.

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[4] Defendant argues that "[t]he right to effective assistance of counsel is even more important in a death-eligible case like the present one." (Jur. Stat. at 16, n.9) However, this Court formulated the standard for review in the context of a capital case. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Defendant incorrectly argues that the prosecution had equivalent access to the information. (Jur. Stat. at 15) The prosecution had no access to information disclosed outside its presence.

Defendant fails to present a compelling attack against the decision below. Instead, it is clear that the present situation involves a state court's application of its own discovery rules in a manner which does not diadvantage the accused or contravene any of the accused's federal constitutional rights. This Court should decline review of this cause.

CONCLUSION

For these reasons, appellee requests this Court to dismiss this cause because appellant has failed to state a substantial federal question.

Respectfully submitted,

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